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of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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March 6, 1995

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N. E.
Suite 2-500, South
Washington, D. C. 20002-8002

Dear Judge Conaboy:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I appreciate the opportunity to respond to the proposed amendments and issues for comment published for consideration for the 1995 guideline amendment cycle.

After careful analysis, we have decided to focus on a few amendments which we believe merit the most serious consideration this cycle. We particularly urge the Commission to adopt amendments involving role, supervised release, and undischarged sentences. Our comments on those proposed amendments are outlined in the first few sections below. In addition, we have commented on some of the proposed amendments which would implement the Violent Crime Control and Enforcement Act of 1994, and some of the proposed drug amendments.

I. ROLE AMENDMENTS (Amendments 34-35)

The centerpiece of our presentation this year is the need to refine and improve the role guidelines. The Criminal Law Committee believes that

change in this area is of paramount importance and long overdue. The Committee applauds the work your staff has done in generating the proposed role amendments, attempting to identify and utilize factors which more accurately define what constitutes an aggravating or mitigating role in any particular offense. While the Committee strongly supports the concept of the proposed amendments, we also believe that further refinements are essential.

Need for Change

The role adjustments potentially impact almost every criminal sentence. The present adjustments are not adequately explained or defined, which is perhaps one reason why the role adjustments have been seriously under-utilized to date.¹ For example, there is a two-level distinction between a minimal and minor participant. The former is defined only as one "among the least culpable of those involved in the conduct of a group," while the latter is defined as one "who is less culpable than most other participants" but not enough to be minimal. Similarly, the aggravating adjustments make distinctions between one who is "an organizer or leader" and one who is a "manager or supervisor." We strongly believe that these distinctions are so gossamer that they strip the guidelines of their potential real value. The vice is compounded by the fact that different guideline scores result from the use of these very imprecise terms. As a result, judges are frequently inclined to simply avoid going down a road that is so poorly marked. Our beliefs are confirmed by tests recently conducted by the Probation Advisory Group, which concurs that major reform is needed in this area.

The role adjustments that we support would further the goal of simplifying the guideline system. Since role adjustments apply day in and day out in virtually every case, we believe that the role guidelines should be amended now, regardless of what action the Commission chooses to take or not take with respect to drug guidelines. In that connection, however, the Judicial Conference has repeatedly urged that sentences in drug cases be driven less by drug quantity. It is our firm belief that a realistic, practical scheme of making role adjustments would go a long way toward balancing the quantity factor in drug cases. We further believe that such an adjustment would be far better than attempting to totally remove quantity from the sentencing formula and would also be more logical and appropriate than ad hoc efforts to arbitrarily adjust some present drug offense levels.

¹ The Commission's 1993 Annual Report, page 88, indicates that only approximately 10% of defendants received any mitigating role adjustment in 1993: 3% received "minimal," 6.5% received "minor," and .6% received between minor and minimal. Only 7.3% of defendants received any aggravating role adjustment in 1993: 2.4% received +4, 1.6% received +3, and 3.5% received +2.

Our Proposal

While the Committee strongly endorses the concept of the currently proposed role amendments, we believe that the proposed role amendments are too lengthy and too complicated. Moreover, to a considerable extent the amendments are still overly mechanical and rigid, considering the fact that, as stated in one of the proposed application notes, the difference in roles in any particular case is always one of degree, depending upon the presence and intensity of various factors. For that reason, the cornerstone of our proposal is that there be only a "mitigating" or an "aggravating" role adjustment. One could receive an increase or decrease of anywhere from one to four levels, depending upon the number and intensity of the factors existing in that particular case. More specifically, our proposal would include the following significant features:

1. The adjustment would be simply an "aggravating role" or a "mitigating role" adjustment. Both guidelines would be similar, and symmetrical.
2. The court would be asked to consider a list of factors, and the court would determine if the defendant's role was predominantly aggravated or mitigated, or neither, depending on the presence and intensity of the factors.
3. The court would decide, based on the presence and intensity of the factors, how large an adjustment to apply (1-4). This gives the court a "sliding scale" upon which to place the defendant's role.
4. Key terms would either be defined or would be self-evident; no adjustment would depend on a single terminology distinction (such as organizer or manager; minor or minimal).
5. It would not be necessary for the court to perform the difficult and meaningless task of comparing the defendant's activity to a defendant who might commit the entire offense alone.
6. There would be no mechanical measurements, such as a requirement that a certain number of persons be involved or be supervised, in order for the adjustment to apply.

Based on the above criteria, we have redrafted the role amendments in the **Attachment**, to illustrate at least one form that they might take.

Summary

This proposal: a) provides needed definition and guidance, b) assists in providing more proportional sentences, c) eliminates ambiguous terms, d) encourages full use of the role adjustments, e) provides for a judgment by the court based on multiple factors, and f) remains relatively simple in organization and application. The court's findings, which would usually be based on a combination of fact-based factors, will not be easily reversed on appeal because of the multiple-factor basis of the findings.

We urge the Commission to make a significant contribution this amendment cycle by enacting new role guidelines which would be similar to, and embody the significant features of, our proposed amendments.

II. SUPERVISED RELEASE (Amendment 45)

The Committee asked the Commission to publish an "Issue for Comment," asking whether "...the supervised release guidelines should be amended to permit greater consideration of the individual defendant's need for supervision after imprisonment..." More specifically, we asked whether §5D1.1 should be amended to eliminate the current requirement that supervised release be imposed in all cases where a term of imprisonment of one year or more is imposed, and whether §5D1.2 should be amended to reduce the terms of supervised release required to be imposed? We believe that these questions very definitely should be answered in the affirmative.

Changing Numbers and Character of Supervised Offenders

The court system and, most particularly, the probation system, is already beginning to feel a heavy burden from the rapidly growing numbers of supervised release cases. For example, in 1989 there were 1,673 offenders on supervised release and 53,589 offenders on probation. All categories of supervision (including parole, mandatory release, and military parole) totaled 77,284 offenders on supervision. In 1996 the projected numbers show 49,100 on supervised release and 34,800 on probation, with a total on supervision of 92,100.²

Not only are the total numbers rising, but the character of the supervised offenders is markedly changing. In 1989, 32% of offenders under supervision had been released from prison (69% were on probation). In 1994, 54% of offenders under supervision had been released from prison (46% were

² The numbers on supervised release are rising far faster than the numbers on probation and parole are falling. The consecutive years between 1989 and 1996 show the following figures for supervised release: 6,138 (in 1990), 11,949 (in 1991), 19,362 (in 1992), 26,384 (in 1993), 33,900 (in 1994), and 42,600 (in 1995).

on probation). It is projected that in 1996, 61% of the 92,100 offenders under supervision of the court will have been released from prison (with only 39% on probation).

Supervised release offenders are post-custodial offenders. Such offenders generally demonstrate a higher violation rate than probationers. For example, in fiscal 1993, the violation rate for post-prison release cases was 37% compared to 15% for individuals on probation. Supervised releasees also require more intensive supervision by probation officers than probationers, and are more likely to require substance abuse treatment and tests. With 92,100 offenders on supervised release in 1996, if 37% require violations, that means there will be 34,040 violation hearings in federal court in 1996. This is a significant new demand on court time, especially given that parole violation hearings did not involve the courts.

Varying Needs for Supervised Release

It is also clear that not all defendants need supervision and those that do, do not need the same term of supervision. While some period of supervision may be helpful for most defendants, there is no convincing evidence that extensive periods of supervised release are needed to meet the goals of the criminal justice system. In fact, there is evidence that shorter periods of supervised release serve the purpose of rehabilitation and permit a determination to be made of whether the offender is likely to recidivate or not. A 1994 study by the Bureau of Prisons indicates that most people who are going to recidivate do so within the first year after release.

Statutory Authority

Title 18 U.S.C. § 3583(a) allows for court discretion in imposing supervised release: "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, [but shall do so if a statute requires it]." (emphasis added). In addition, the Commission has the authority to promulgate guidelines for use by the court in making "a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term." 28 U.S.C. § 994(a)(1)(C).

The courts have read guideline sections 5D1.1 and 5D1.2, which mandate terms of supervised release, to be consistent with the discretion provided in section 3583(a), on the theory that courts could "depart" from the terms of supervised release set out in the guidelines. U.S. v. Chinske, 978 F.2d 557, 558-9 (9th Cir. 1992); U.S. v. West, 989 F.2d 1493, 1503 (11th Cir. 1990). However, courts are understandably reluctant to depart, given the burden to

be met by the court (*i.e.*, the court must find "aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." §5K2.0), which would be unlikely to be met if the sentence was not otherwise a departure.

Our Proposal

The Committee urges that the Commission amend the guidelines to reflect the discretion provided in the statute, *i.e.*, to allow the court to decide whether supervised release should be imposed or not, and what the length of the term of supervision should be if it is imposed, unless a term of supervised release is mandated by the offense or otherwise set by law.

Specifically, the Committee requests that the Commission change its current guideline section 5D1.1 to the following:

- (a) *The court shall order a term of supervised release to follow imprisonment when required by statute.*
- (b) *The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, unless the court specifically finds that supervised release is not required to protect the public from further crimes of the defendant, for the facilitation of payment of a financial penalty or participation in a drug treatment program, and for the reintegration of the defendant into society.*
- (c) *The court may order a term of supervised release to follow imprisonment when a sentence of imprisonment of one year or less is imposed.*

This language would create a rebuttable presumption in favor of the imposition of supervised release when the sentence is over one year, but allow the court the flexibility, without requiring a departure (as currently suggested in the notes), not to impose it where the court makes specific findings that it is not necessary.

The Committee further requests that the Commission change the current guideline section 5D1.2 to the following:

- (a) *If a defendant is convicted under a statute that requires a term of supervised release, the term shall be not more than five years unless otherwise provided by law.³*

³ This proviso is designed to account for any longer mandatory minimum sentences in title 21 cases. It does not attempt to account for the holding in the Fifth Circuit

- (b) *Otherwise, when a term of supervised release is ordered, the court shall order a term of supervised release that is no longer than that required to protect the public from further crimes of the defendant, to facilitate payment of a financial penalty or participation in a drug treatment program, and to reintegrate the defendant into society.*

We believe these changes would result in much more efficient and rational allocation of judicial resources and serve the purposes for which Congress intended supervised release.

III. UNDISCHARGED TERMS OF SENTENCE (Amendment 46)

General Comments

The Committee strongly urges the Commission to significantly change Policy Statement §5G1.3(c). The Probation Officers' Advisory Group has urged simplification of this provision two years in a row. We believe, as well, that the Policy Statement is desperately in need of simplification.

Although not all courts have yet experienced the extreme difficulty of attempting to carry out the commentary's suggested procedure, nearly all probation officers have been required to do so in order to provide the court with the option of following this Policy Statement.

The confusion and excessive use of resources caused by this provision are, simply put, not worth the benefits that may occasionally result from its application. The few cases in which a perceived injustice might take place if the suggested procedure were not followed could easily be prevented by the exercise of discretion which the statute (18 U.S.C. § 3584) grants the court. The suggested §5G1.3(c) procedure raises the frustration level, wastes resources, and erodes confidence in the guideline system. The harm sought to be avoided is no worse than the harm brought about by the process; indeed, the cure may well be worse than the disease.

We believe the procedure itself is far too complicated and esoteric, and asks courts to rely on unreliable information. It also asks courts to "credit" the instant sentence with time served on other sentences. This not only may result in double crediting by the Bureau of Prisons, but is something the

that the caps on supervised release terms in section 3583(b) limit the terms of supervised release in title 21 cases. *See, U.S. v. Kelly*, 974 F.2d 22, 24 (5th Cir. 1992); *But see, U.S. v. Eng*, 14 F.3d 165, 173 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 54. Courts in that circuit may not be able to impose terms of supervised release up to five years in some cases.

Supreme Court has said only the Bureau of Prisons is authorized to do. See, Wilson v. U.S., 112 S.Ct. 1351 (1992).

Also, the Commission's desired result of imposing only an incremental increase for the instant offense, as if all sentences were imposed simultaneously with the federal one, is not necessarily appropriate. That is, there is no clear policy underpinning for §5G1.3(c) as there is for sections (a) and (b).

Finally, the disparities created by the provision are as great or greater than those sought to be avoided. For example, a defendant receiving a §5G1.3(c) adjustment off a federal sentence fares better than a similarly situated co-defendant who did not commit another crime for which there is an undischarged term, and better than one who had recently completed serving another term who will also not receive the adjustment.

Our Proposal

Our proposal is to change §5G1.3(c) to simply state:

"(Policy Statement) In any other case, the court should exercise its discretion in complying with 18 U.S.C. § 3584 to sentence the defendant concurrently or consecutively, to effect a reasonable punishment for the instant offense."

Further, the current commentary should be omitted. No "incremental" sentence is suggested, merely a just and reasonable sentence. No detailed explanation is necessary. We believe that the statutory discretion given the court, combined with the advocacy on which the judicial system depends, would generally provide just sentences by the use of concurrent sentencing in those few cases in which purely consecutive sentences would generate an apparently unjust result. The guidelines would be a couple of pages shorter, the hot line would be relieved, and the resources currently expended on this exercise could be directed elsewhere.

In the alternative, if the Commission decides to retain the suggested result of an incremental sentence, we suggest that the Commission add to our proposed Policy Statement, above, some simple commentary which merely states the desired result, such as:

"In effecting a reasonable punishment for the instant offense, the court should attempt to determine what reasonable incremental punishment should be imposed for the instant offense, in addition to the time already served on the other offense, taking care not to generate successive consecutive sentences which would result in significantly more total imprisonment than if the offenses were sentenced federally, together. This

should be done only to the extent that the court can accurately determine the information necessary,"

If the Commission does not accept our primary or alternative proposals, we strongly urge that, at a minimum:

- a) Section 5G1.3(c) should remain a Policy Statement, no matter what; and
- b) Option 2 is far superior to Option 1 or the current Policy Statement, because it only suggests that this complicated procedure be done when the undischarged term is another federal (non-departure) sentence, ensuring reliable information regarding the guidelines and time to be served.

IV. OTHER AMENDMENTS

Our comments on the other proposed amendments will be relatively brief. We will comment only on those which we either oppose, or which we believe deserve comment or support.

A. Violent Crime Control and Enforcement Act of 1994

Where the Commission has suggested alternative ways to implement a provision, we would generally prefer the use of a suggested departure, where possible. This is particularly true for sentencing factors which would appear relatively infrequently. We believe new Chapter Three guidelines should only be created sparingly.

Amendment 7 - Repeat Sex Offenses

The Commission's proposed amendments insert departure suggestions in certain sexual offenses under Chapter Two. They also provide for a departure under "Adequacy of Criminal History Category" for prior convictions involving death, serious bodily injury (or attempts to inflict either), as well as sexual offenses which are similar to the instant offense, if not otherwise accounted for by Career Offender or Armed Career Offender guideline provisions. The proposal also seeks comment on whether Chapter Two sexual offenses should provide for an adjustment rather than the suggested departure for similar prior offenses.

After careful review, we believe that there are advantages to the broader approach and, thus, recommend a departure under Chapter Four (adequacy of criminal history) not only for sexual offenses, but for all similarly serious prior violent offenses. As the Commission notes,

this change implements the congressional directive more broadly than required, but it recognizes that all forms of aggravated assault, sexual or non-sexual, deserve the same treatment. It thus avoids creating disparities which would result from suggesting departures only for prior similar sex crimes but not for prior similar murders, attempted murders, or other violent felonies. If this approach is adopted, it would seem unnecessary and repetitive (as well as incomplete) to also note the same possible departure under each sex offense.

Amendment 11 - Drug Offenses Near Protected Locations

We prefer a modification of the proposed revision listed in subpart eleven of **Amendment 42**, discussed below, to this proposal.

Amendment 22(B) - Immigration Offenses

This provision involves statutory changes for unlawfully entering or remaining in the United States. The statutory sentence limitations in some parts of 8 U.S.C. §§ 1252(e) and 1326(b) are decreased, but most are dramatically increased. In addition, a new offense is created for reentry after convictions for 3 or more certain misdemeanors. Again, the Commission asks if any adjustments should be made. We recommend that, at a minimum, a specific offense characteristic (SOC) be added to §2L1.2(b) to accurately and completely track the statute involving the three misdemeanors. If not changed, the guideline would track part, but not all, of the statute's aggravating factors.

Amendment 22(D) - Immigration Offenses

We recommend the amendment as proposed by the Department of Justice. It suggests a departure, rather than a high point within a sentencing range, for §2L1.2 when a defendant has repeated prior instances of deportation without a criminal conviction. Because of the large numbers of these types of immigration cases, the use of aliases by defendants, and the overburdened court system, it is often easier to use voluntary deportation rather than to seek a criminal conviction when dealing with a defendant's first or second illegal entry. This is a very common factor in many immigration cases, and it is not specifically accounted for in the guidelines other than with a non-specific departure based on the adequacy of criminal history. We believe that the amendment we recommend would make it easier for a judge to depart and be sustained on appeal.

B. Drug Amendments

While we support the general intent of the more sweeping proposed changes to the drug guidelines,⁴ we believe such proposals require more detailed study and extensive analysis before being adopted by the Sentencing Commission. We urge the Commission to move cautiously in this area, and to study how these proposals would interact with each other and with current statutory penalties, and what effect, if any, they would have on the safety valve.

Before these kinds of fundamental changes are made, there needs to be a consensus on the need for and direction of these kinds of revisions. While we do not dismiss these proposals out of hand, we urge caution and study of their interaction and effect on actual cases and court practice. We believe that the worst thing that could occur would be to change the drug guidelines dramatically, only to discover that other dramatic changes are needed soon thereafter to accommodate the revisions.

Also, if simplification is, indeed, given serious consideration in the near future, major drug guideline reform should be commensurate and consistent with whatever changes are made, to achieve a coherent whole.

Finally, as we noted in our first section, we believe that an intelligent redefinition and expansion of the role determination would relieve many of the problems perceived with the drug guidelines, at least for the time being, until comprehensive change of the drug guidelines can be agreed upon and effected, perhaps as part of a simplification scheme.

However, there are some proposals within Approach One which would be helpful this year. They would refine the accuracy and fairness of the application of the drug guidelines, and would not effect a dramatic, fundamental change to the drug guidelines. We will comment briefly on those, below.

Amendment 37 - Marihuana Plants

This proposal would use a consistent scheme for counting marihuana plants. This appears sensible and fair, and represents a fine-tuning, based on experience, of the application of the drug guideline to marihuana plants.

⁴ These would include the drug chart compression options, the cap for mitigating role, and the purity amendment in Approach One, and all of Approach Two.

Amendment 38 - Crack

The crack ratio question is a critical issue. We applaud the Commission for doing a study, and urge it to resolve the issue as fairly and expeditiously as possible.

Amendment 41 - Counting Pills

This proposal appears to be another reasonable, fine-tuning of the drug guideline as applied to certain drugs. The information regarding drug weight is apparently easy to obtain, and this amendment would be consistent with prior amendments regarding LSD and cocaine base.

Amendment 42 - Twelve Miscellaneous Drug Amendments

Most of the twelve sub-parts of this proposal are reasonable, non-disruptive, and helpful improvements to the drug guideline calculations. Where alternatives are offered, we support a departure suggestion, where possible. We wish to specifically comment on only three sub-parts of this proposal, one we specifically support, and two which we oppose.

Parts 8 and 10

We have serious reservations about *Parts 8 and 10* of proposed **Amendment 42**. These relate to possible departures for a defendants who allegedly did not know the type or quantity of the controlled substance which they possessed (*Part 8*), and for defendants who allegedly intended personal use of some portion of the controlled substance that they otherwise possessed for distribution (*Part 10*).

With respect to *Part 8*, our concern is that such a claim, *i.e.*, ignorance of the type or amount of contraband, is very frequently made. At the same time, it is a claim almost always impossible to verify. We suggest that it might be more prudent to await the development of caselaw in this area before inviting departures on that ground.

With respect to *Part 10*, it is our experience that such a case, *i.e.*, where the defendant claims that part of the contraband possessed for distribution is intended for personal use, is rare, and therefore we would not ordinarily support making any changes in this regard. However, it may be reasonable to resolve the circuit split by noting that ordinarily amounts claimed for personal use should not be subtracted from amounts possessed for distribution. Beyond that, a departure

should not be encouraged, because to do so would benefit drug users over non-users.

Part 11

The Committee asks the Commission to adopt a slightly modified version of the proposed change listed in the eleventh subpart of **Amendment 42**, which amends Application Note 2 of §2D1.2 dealing with drug trafficking near protected locations. The Committee believes that this amendment is preferable to the proposed **Amendment 11**, which we understand would arbitrarily fix the offense level at 13 if the stipulated condition(s) were met, apparently regardless of the amount of narcotics involved, or regardless of whether the persons or locations intended to be protected by the statute are exposed to the criminal activity.

We do, however, believe that it is desirable to provide the court with an appropriate remedy in the rare instance when this kind of law enforcement activity occurs. We suggest the following form for Application Note 2 of §2D1.2 (our changes are underlined):

If the offense was committed at or near a protected location, but (A) the offense did not create any increased risk for those this guideline was intended to protect; and (B) the location was determined by law enforcement personnel or someone acting under the direction or control of law enforcement personnel, rather than by the defendant, a downward departure (to the offense level that would have applied if the offense had not involved a protected location) may be warranted.

The proposed change from "or" to "and" restricts the use of this departure only to cases where not only the law enforcement agents selected the location, but also where it is clear that no additional risk to protected persons or locations is created by the offense (such as if the offense took place near a school at night or in the summer, or in a motel out of sight of the protected location). This modification of the proposed amendment reflects our belief that the statute is intended to provide for serious punishment when there is harm done to protected persons and places, regardless of who selected the location. Our proposal also adds a phrase which we borrowed from proposed **Amendment 11**, to include confidential informants as well as actual law enforcement agents.

We believe this proposal, as modified, will sufficiently deter the selection of locations by law enforcement agents for the purpose of impacting the sentencing process.

Amendment - 43

The Committee believes that sentences in drug cases should not be driven so completely by drug quantities, which is why we so strongly support meaningful amendments to the role adjustments. At the same time, however, we believe it unwise and unrealistic to almost totally eliminate the quantity factor.

C. Money Laundering (Amendment 44)

We support this amendment's goal of tying the money laundering offense level more closely to the underlying criminal activity, where known. With regard to choosing among the various forms of this proposal, we generally support making sentences for drug offenses higher than for fraud offenses.

D. Career Offender Circuit Split

On February 15, 1995, we wrote the Commission asking that consideration be given to an amendment which would resolve the circuit split regarding whether drug conspirators can be sentenced as career offenders, sometimes referred to as the "Price issue." We asked that the Commission consider issuing a second publication just for this amendment, if it believes that publication is necessary in order to resolve the issue this amendment cycle. We ask that our letter of February 15 be considered, along with this letter, regarding proposed amendments for this amendment cycle.

V. CONCLUSION AND OTHER THOUGHTS

The Committee on Criminal Law appreciates the opportunity to comment on this year's proposed amendments. We know that the duties of implementing the Violent Crime Control and Enforcement Act of 1994, combined with several significant reports required by Congress, has impacted the Commission's usual business of attending to the yearly amendment cycle. We hope that our comments are helpful.

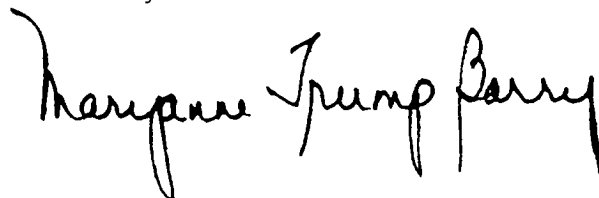
We have two final requests which relate to the amendment cycle process itself. First, we would request that the Commission publish each cycle's proposed amendments and issues as early as possible, preferably in December, and that the Commission make the "reader friendly" version available at the time of publication. (Incidentally, we appreciate the Commission's preparation of the "reader friendly" version, which helps our analysis greatly.)

If we are to be able to conduct a careful analysis of the published amendments and issues and make intelligent and helpful comments, we need, and would appreciate, more time for response than was available this year.

Second, we request that the Commission make available a package of purely legal, or "technical" amendments, designed to avoid or eliminate needless litigation or resolve circuit splits, well in advance of the time necessary to decide what to publish. This would allow response groups to support those amendments which they believe would be most helpful, and make it less likely that such amendments would be lost in a larger packet of amendments involving policy changes, simplification, or consolidation.

Again, we appreciate the Commission's consideration of our views, and we look forward to the meeting on March 13, 1995.

Sincerely,

A handwritten signature in black ink, reading "Maryanne Trump Barry". The signature is written in a cursive, flowing style.

Maryanne Trump Barry

cc: Honorable Michael S. Gelacak, Vice Chairman
Honorable A. David Mazzone, Vice Chairman
Honorable Wayne A. Budd, Commissioner
Honorable Julie E. Carnes, Commissioner
Honorable Michael Goldsmith, Commissioner
Honorable Deanell R. Tacha, Commissioner
Honorable Jo Ann Harris, ex-officio
Honorable Edward F. Reilly, Jr., ex-officio

ATTACHMENT

Part B - ROLE IN THE OFFENSE

Introductory Commentary:

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), (*i.e.*, all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with §1B1.3, which focuses upon the acts and omissions in which the defendant participated (*i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused) and, in the case of jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were foreseeable.

Only one role adjustment, either a §3B1.1 (Aggravating Role) or a §3B1.2 (Mitigating Role), is to be applied. In making this determination, the court shall assess whether the defendant's role is predominately aggravating or predominately mitigating and, if neither predominates, no role adjustment shall be applied.

For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been apprehended, convicted, or identified, so long as the court is satisfied that another participant(s) was involved in the criminal activity. In some cases, some defendants may warrant an upward adjustment under §3B1.1, other defendants may warrant a downward adjustment under §3B1.2, and still other defendants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may also apply to offenses committed by any number of participants.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level by 1, 2, 3, or 4 levels, according to the presence and intensity of the factors listed in Application Note 1.

Application Notes:

1. Characteristics ordinarily associated with an aggravating role include:
 - (A) the defendant planned or initiated the criminal activity;
 - (B) the defendant had decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;
 - (C) the anticipated or total compensation or benefit to the defendant would have been or was greater than that anticipated or received by the other participants in the criminal activity;
 - (D) the defendant had an ownership interest in, or helped finance, the criminal activity;
 - (E) the defendant induced other participant(s) to engage in the criminal activity;
 - (F) the defendant performed sophisticated tasks in furtherance of the criminal activity;
 - (G) the defendant possessed substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants; and
 - (H) the defendant possessed a firearm or directed or induced other participant(s) to possess a firearm.
2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a 1, 2, 3, or 4-level increase. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(H).
3. Because the court's determination of the amount of the aggravating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(H), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.

4. Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with an aggravating role adjustment. In determining whether an aggravating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level by 1, 2, 3, or 4 levels, according to the presence and intensity of the factors listed in Application Note 1.

Application Notes:

1. Characteristics ordinarily associated with a mitigating role include:
 - (A) the defendant did not plan or initiate the criminal activity;
 - (B) the defendant had no more than minimal decision-making authority or management responsibility over the property, finances, assets, or other participants involved in the criminal activity;
 - (C) the anticipated or total compensation or benefit to the defendant would have been or was less than that anticipated or received by the other participants in the criminal activity;
 - (D) the defendant neither had an ownership interest in, nor helped finance, the criminal activity;
 - (E) the defendant held or transported contraband for others;
 - (F) the defendant primarily performed unsophisticated tasks, whether necessary or unnecessary to the successful completion of the criminal activity;
 - (G) the defendant did not possess substantial knowledge or understanding of the scope and structure of the criminal activity or of the relevant criminal activity of other participants;
 - (H) the defendant facilitated the successful commission of the criminal activity, but was not essential to that activity; and
 - (I) the defendant did not possess a firearm or direct or induce other participant(s) to possess a firearm.

2. When applying this section, the court must make specific findings regarding the defendant's role in the offense, and clearly articulate the factors the court is relying on to impose a 1, 2, 3, or 4-level decrease. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed in Application Note 1 (A)-(I).
3. Because the court's determination of the amount of the mitigating role adjustment requires a weighing of the factors listed in Application Note 1 (A)-(I), the Commission recognizes that such a determination will be heavily dependent upon the facts of each case.
4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted, because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.
5. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing the factors associated with a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts that may be relevant to a determination of the defendant's role in the offense.